IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE CITY OF PORTLAND, Defendant.	3:12-cv-02265-SI March 24, 2014 Portland, Oregon

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT JUDGE

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(March 24, 2014)

P R O C E E D I N G S

(Open court:)

THE CLERK: This is the time set for hearing in Civil Case 12-2265-SI, U.S.A. versus City of Portland.

Counsel, beginning with plaintiff, would you please identify yourselves for the record.

MS. JONES: Michelle Jones for the United States, along with my colleagues John Geissler, Adrian Brown. Behind me, we have David Knight and Billy Williams.

THE COURT: Welcome.

MS. ALBIES: J. Ashlee Albies for Intervenor AMA Coalition for Justice and Police Reform, along with Shauna Curphey.

MR. KARIA: Anil Karia for the Portland Police Association.

THE COURT: Good morning. Welcome.

MS. OSOINACH: Ellen Osoinach for the City.

MR. WOBORIL: David Woboril, City of Portland.

THE COURT: Welcome. Before hearing further argument from the four parties, I think it might be useful for you to hear how I'm tentatively viewing the matter before me. So my plan is to briefly identify my tentative thoughts, and then perhaps take a short break, and then

give the parties an opportunity to respond.

Is that procedure acceptable to the parties?

MR. GEISSLER: It is, Your Honor. Thank you.

MR. WOBORIL: For the City, that's fine, Judge.

MS. ALBIES: Yes, Your Honor.

MR. KARIA: Yes, Your Honor.

THE COURT: The United States brought this lawsuit against the City of Portland under 42 United States Code §14141. The United States and the City of Portland have entered into a proposed settlement agreement and have jointly moved the Court to accept the settlement agreement as an order of the Court. Both the United States and the City agree that entering into the settlement agreement, rather than engaging in contested litigation, is the best way to resolve the claims brought by the United States in this matter, which concern policing practices in the City of Portland.

Both the United States and the City further agree that it will likely take several years, possibly as many as five years, for the City substantially to comply with all of the provisions of the settlement agreement. In addition, both the United States and the City jointly ask the Court to retain jurisdiction over this action for all purposes until the City substantially has complied with all of the provisions of the settlement agreement and

has maintained substantial compliance with all provisions for one year.

The question now before the Court is whether the settlement agreement, as a whole, is fair, adequate, and reasonable as a means of revolving the claims raised in the complaint. To assist the Court in answering that question, the Court held a fairness hearing on February 18th and 19th, 2014, and received both pre-hearing and post-hearing written submissions and oral testimony from the United States, the City of Portland, Intervenor-Defendant Portland Police Association, Enhanced Amicus Curiae Albina Ministerial Alliance Coalition for Justice and Police Reform, which I refer collectively as the four parties or the parties, and numerous members of the public.

As the United States explained in its post-hearing memorandum, this settlement agreement "will fundamentally alter the way in which Portland Police interact with the people who live and work in the City. It creates a foundation to protect the civil rights of all Portlanders, particularly those that live with mental illness." The United States continues: "The goal of this litigation -- to ensure that the Portland Police Bureau has adequate policies, procedures, training, and accountability in place so that encounters with people

with mental illness are constitutional -- will be achieved through the implementation of the agreement. Approval of this agreement will ensure that there is a roadmap for sustainable reform. It will ensure DOJ monitoring of remedies; public use-of-force audits; increased community-based mental health options; workable solutions to Citizen Review Committee deadlines and meaningful Independent Police Review investigations; negotiating changes to the 48-hour rule with the district attorney; data gathering; and much more." That's from the United States' post-hearing memorandum.

The City of Portland, in its post-hearing brief, expressed very similar comments. According to the City of Portland, the settlement agreement "represents an historic opportunity for the City to engage in focused and sustained efforts to improve outcomes in encounters and persons in need of mental health crises services and local law enforcement. The remedies in the agreement specifically targeted to that issue are supported by several mental health organizations." The City of Portland in its post-hearing brief also notes that "holding officers accountable for their conduct is an integral part of building community trust, and the City pursues that goal within and outside of the agreement."

The Defendant-Intervenor, Portland Police

Association, stated in its post-hearing memorandum that the Portland Police Association supports the "entry of the settlement agreement between Plaintiff United States and Defendant City of Portland." The Portland Police Association continued in their brief: "While the Portland Police Association vigorously disagrees that the Portland police officers have engaged in unconstitutional policing, the settlement agreement -- in its current, unaltered form -- is a fair, adequate, and reasonable resolution to the allegations in the United States' complaint."

However, here, I must pause and offer the Court's perspective on a comment made by the president of the Portland Police Association a few days after the public fairness hearing concluded. The president of the Portland Police Association commented that "never have I been exposed to such an array of complaints directed at the men and women who risk their lives every day to protect those who fall victim to crime, misfortune, or crises." He then added that he "left the federal courthouse wondering why we do the work we do. Why do we put ourselves at risk on a daily basis? And why do we expose ourselves to the scrutiny of those who have never walked in our shoes?" The president of the Portland Police Association concluded with his answer. He said, "Because it is just what we do."

I would like to offer another answer to those questions. In response to the question of why do the sworn law enforcement officers put themselves at risk on a daily basis, I believe that the answer is that they believe, and they are committed, to the depths of their souls, in the rule of law, and they heroically enforce the rule of law in order to protect everyone in society from lawless conduct.

But that answer to the first question, I believe, also answers the second question posed by the president of the Portland Police Association when he asked, "Why do we expose ourselves to the scrutiny of those who have never walked in our shoes?" The answer to that question is the same as the answer to the first question. It is because that is the very nature of a constitutional democracy under the rule of law. The very nature of the rule of law requires that the police subject themselves to the scrutiny of and oversight by those who have never walked in their shoes -- and that they receive the praise and commendation when appropriate and that they also receive constructive criticism and oversight when appropriate.

The founders of this nation, when they devised our Constitution, created a system of checks and balances and separation of powers. Never before in the history of

the world had that been done. And that system has served us very well, on a path of continuous improvement ever since.

This great principle leads me to the concerns that I currently have with the proposed settlement agreement in the form that the parties are presenting me with.

The proposed settlement agreement, in paragraph 178, provides that the United States and the City of Portland will jointly move, or ask, the Court to "conditionally dismiss the complaint in this action with prejudice, while retaining jurisdiction to enforce the agreement," if called upon to do so by the United States. According to paragraph 178, if that motion were granted by the Court, then if the United States does not call upon the Court to take any action, the Court will have no knowledge of what progress is or is not being made until approximately October 12th, 2017, which is more than three and one-half years from now.

Now, the United States, through the U.S. Department of Justice and the U.S. Attorney's Office, assures us that they will vigorously monitor the progress that the City of Portland is making towards achieving substantial compliance with all of the terms of the settlement agreement. For those dedicated individuals who

are currently representing the United States in this case, I have nothing but respect and praise. But prosecutorial and enforcement priorities can change over time.

Part of the genius of our founders, when they created a system of checks and balances and separation of powers, is that they placed the judicial power of the United States in the hands of judges who serve during good behavior, which generally means life tenure.

If the parties were to agree that this Court could periodically, and by that I mean approximately annually, hear from all of the parties, and that includes both Intervenor-Defendant Portland Police Association and Enhanced Amicus Curiae Albina Ministerial Alliance Coalition for Justice and Police Reform, if they wish to be heard -- and also hear from the City-appointed Compliance Officer/Community Liaison, the COCL, simply on how compliance with the settlement agreement is progressing and whether there are any obstacles or impediments to achieving substantial compliance with all of the provisions of the settlement agreement, and if the parties were to agree that I could then hold the case in abeyance; that is, to stay the litigation, rather than to dismiss it with prejudice, even conditionally, then I would be prepared to approve the settlement agreement today.

It is not the intention of the Court to micro-manage compliance activities or even to enter any substantive orders, unless there is a specific motion to do so brought by the United States that is well supported on both substantive and procedural grounds. I understand the mediation component of this, and that's what I mean by "procedural grounds." I am satisfied with the parties' responses to my several post-hearing questions regarding the specific points in the settlement agreement. My comments and my concerns relate to procedure and continued understanding by the Court of how things are progressing.

So I am not satisfied with the prospect that three and one-half years can go by with the Court hearing absolutely nothing about how substantial compliance is progressing. I have serious concerns that a requirement of the Court must dismiss the case with prejudice, even conditionally, upon approval of the settlement agreement in the particular fashion that the parties are requiring or insisting upon, as opposed to staying the case, will render the settlement agreement in that fashion inadequate.

I note here that the United States, in its post-hearing submission, states that it has no objection to the Court staying the litigation and holding annual, or even semi-annual, conferences -- and, frankly, right now,

I am inclined to think that annual conferences are sufficient -- to receive in open court reports from the parties, the four parties, and the COCL and to answer the Court's questions about how matters are progressing. Now, if all parties were in accord, if all parties agree, that would enable me to conclude today that the settlement agreement is fair, adequate, and reasonable.

I note, however, that, at least as stated in their post-hearing memoranda, both the City of Portland and the Portland Police Association believe that the Court holding periodic hearings, even on an annual basis and just for the purposes of receiving information, would violate the settlement agreement in their opinion and doing so is opposed by both the City of Portland and Portland Police Association, as stated at least in their post-hearing memoranda.

I note that the enhanced curiae has no objection to the Court serving in that capacity, and the amicus curiae, in their post-hearing memoranda, even commented that the Court can order that even over the objection of the City or the Portland Police Association, because the settlement agreement at paragraph 178 simply provides that the parties will jointly ask the Court to dismiss the case with prejudice, albeit conditionally, and that there is no condition precedent or subsequent in the settlement

agreement that the Court actually have to grant that motion. Perhaps we can discuss that a bit further.

I know that the United States argues that I can simply approve the settlement agreement, stay the case, and order periodic status conferences. Perhaps that's their reasoning behind that. But because the City of Portland and the Portland Police Association disagree, I may need to hear a little bit more about that, unless we can resolve it otherwise.

The foundation of any contract, and the settlement at its core is just a contract, requires a "meeting of the minds" among contracting parties. If the United States and the City of Portland do not agree on this point, then I would be concerned that there might not be a "meeting of the minds," and if that's the case, there might not be a settlement agreement, except, as I said, in a form that I am not prepared to approve as fair, adequate, and reasonable.

Those are my tentative thoughts. I have prepared a draft order entering the settlement agreement and staying litigation, consistent with what I have just been describing.

Mary, will you pass these around to the counsel.

I do think it would be useful for counsel to review the draft, consider my comments, and then share

with me any views that they may have. I would propose we would take a ten-minute recess for that purpose.

Does ten minutes seem satisfactory?

MS. OSOINACH: Your Honor, I have a question. I am unclear and would appreciate your guidance about what you perceive to be the difference in terms of the Court's authority between staying the case and dismissing it conditionally and maintaining ancillary jurisdiction.

THE COURT: I am not aware of any precedent that provides for the Court to have and to order periodic progress reports when a case has been dismissed with prejudice even conditionally, because the only condition that I see in the agreement is that if the United States moves for enforcement of the agreement, then I have retained jurisdiction and can enforce it according to U.S. Supreme Court precedent.

But in the absence of such a motion from the United States, I question whether I even have the authority to ask the parties -- and by "ask," that's sort of polite for "ordering the parties" -- to come before me on what I'm currently anticipating that is needed as an annual basis, just to tell me how things are going, how things are progressing, are there any problems or obstacles?

I'm confident that no party here would be

intentionally rude or disrespectful to the Court, but if I approve the settlement agreement, I think, as the City currently argues it is to be understood, although there is that interesting point that the amicus curiae and the United States make about the reading of 178. But if I interpret the agreement the way the City does, and I order the parties to report to me on an annual basis how things are proceeding, I think that a party could say, in response, with all due respect to the Court and no rudeness intended: No, thank you. This case has been dismissed with prejudice, conditionally, and the only condition that will get us back in front of the Court is a motion by the United States. And if that hasn't occurred, then there is no further jurisdiction or authority that the Court has to compel the parties to appear.

That's a moderately long-winded answer to your question, but that's my answer.

MS. OSOINACH: That's very helpful. Thank you.

MR. WOBORIL: Judge, the difficulty we faced in responding to the Court's questions was what the uncertainty of what a hearing would look like, how people would behave in a hearing. I think the Court has given us a little more information by describing this hearing as one in which the Court would receive information.

We have designed a system in which the COCL

plays a significant role, a very important role, and reporting to this Court would be a considerable expansion of that role and also another audience to the COCL's already broad range of audiences.

Would the Court expect at the hearing the Court contemplates that there be cross-examination; that there would be a testing of evidence at all? That's the beginning of my questions, and we wonder what it would look like, what responsibilities our COCL would have, how that would change the dynamics of the system we have created.

THE COURT: If you take a look at the proposed order that I have distributed, particularly page 3, the final order that I am proposing here is that the parties and the COCL, and since I have no jurisdiction over the COCL, but I have jurisdiction over the City, it would be by ordering the City to so direct the COCL to appear before the Court at periodic hearings, which are not subject to the stay, to be held approximately annually, unless otherwise ordered by the Court, to describe to the Court the progress being made toward achieving substantial compliance with all provisions of the settlement agreement and any obstacles or impediments toward that end, or to otherwise respond to the Court's questions on those issues.

I am not envisioning, and I do not envision an evidentiary hearing. I do not envision cross-examination. However, if one of the parties were to say to the Court that they would urge the Court to ask a follow-up question, well, then in my discretion I may very well ask a follow-up question. But I would not envision cross-examination. I would not envision an evidentiary hearing.

Although I understand that the settlement agreement does create the role of the COCL, does anticipate that the COCL will prepare quarterly reports, even finalizing those quarterly reports after submitting them in draft to affected or interested parties, including a relevant board that's created. And even though obviously the United States is prepared to be a monitor, the concern that I have is that I may be hearing absolutely nothing about how matters are progressing and whether there are or are not obstacles or problems for three and a half years.

In that respect, and, frankly, only in that respect, I believe that the settlement agreement is not adequate because I believe that does not afford enough information flowing to the Court in a timely fashion. Again, that's a long-winded answer to your question, but that's my answer.

MR. WOBORIL: If I might observe, Judge, the agreement anticipates that the COCL will be generating reports continuously. Those will be available to the Court as well. What I see the Court seeing as advantage in the hearing, except the Court can ask questions, but certainly we can create a mechanism, short of a hearing, for the Court to address questions to the COCL.

Would that satisfy any of the Court's concerns?

THE COURT: I have not seen that proposed by anyone. You understand my concerns. What I present to you here would satisfy those concerns. Whether there are other ways of satisfying those concerns, no one has presented them.

MR. WOBORIL: Thank you.

MR. GEISSLER: Your Honor, may I ask the Court for an electronic copy of the order so we can e-mail it back to Washington, D.C.?

THE COURT: Yes. We will send it out to you right now. Is Word format all right?

MR. GEISSLER: Yes, Your Honor.

MR. KARIA: Your Honor, a quick, clarifying question, based on the Court's explanation of the model that it foresees. I want to be clear. I think I understand where the Court is going with this, but just to be clear, would the Court, in terms of its enforcement

powers, envision itself having the ability to sua sponte order the parties to administer, enforce, construct the settlement agreement in any particular way based on the hearings that the Court has proposed?

THE COURT: No. I do say that I think the Court would have the authority to lift the stay. But then, just with any lawsuit, it is up to the plaintiff to decide what to do further and what to do next.

All right. We will be in recess for ten minutes. I will e-mail that to you right now.

MR. GEISSLER: Thank you, Your Honor.

(Recess.)

(Open court; proceedings resumed:)

THE COURT: Good morning again. Who would like to speak?

Mr. Geissler.

MR. GEISSLER: Thank you, Your Honor. If I may, I would like to offer a summary of where I believe the parties are and an invitation to the City and the AMA and PPA to add further comment.

It is our understanding that the Court is seeking a meeting of the minds whereby the Court would have the ability to have annual status conferences for the COCL and the parties to report on compliance and identifying issues/obstacles to compliance.

It is also our understanding that if a stay were entered with the option that the stay later be lifted, from the plaintiff's point of view, it presents a certain problem. If a stay is lifted, it would require the plaintiff to reinvigorate the case and to prove its case at that point in time. At a later point in time it presents an unsure situation. The City may have complied with some provisions, but not all, and the United States may only want to seek compliance with the missing provisions. Lifting the stay then would change fundamentally the procedure from that of enforcement to that of proceeding with its case-in-chief.

It is also the understanding, from the City's point of view, a stay would fundamentally alter a deal. As Your Honor has noted, the agreement is a matter of contract. There is a certain balancing. On the one hand, the parties could have agreed to a private agreement without any "enforcement or oversight." On the other hand, the United States could have proceeded with very expensive and time-consuming litigation with a very unsure end.

Rather than proceed on either of those lines, the parties agreed to a Rule 41(a)(2), a conditional dismissal, with the Court's conditional dismissal and the final dismissal with prejudice, only after the condition

precedent, that is, the agreement, is fully complied with.

If a stay were put in place, it is our understanding that the City Council would have to vote again and that the entire agreement could unravel. There is a different make-up of City Council and different mayor. There are different concerns today than there were a year ago.

The parties propose that they spend the next two weeks -- this coming week is consumed with spring break for many of the City Council members and others whose families are traveling -- but that in that week we attempt to fashion an appropriate order, agreed to by all four parties, that would provide for a conditional dismissal under Rule 41(a)(2) and that under that rule one of the conditions be annual status conferences before the Court at which the City may present the COCL and COCL reports, and the Court may present questioning, but which would be limited and would not be an evidentiary hearing, and that there would not be general presentation of evidence by all parties.

It is the understanding that if the parties could agree to such a proposed order, that there would be a meeting of the minds. There would be the ability to enter the current settlement agreement, but that the order would meet the Court's requirement of maintaining

continued Court oversight, and that by doing so, we would have a different mechanism than the stay. We would have the agreement that balanced between a private agreement and litigation. We would keep the bargain. We would keep the United States' ability to enforce that bargain through the mediation process and the Court enforcement, and that it would, by all means, give us the remedies that we want while still maintaining Court oversight.

It is our understanding that the City may have further questions on precisely how Your Honor would see such a hearing take place so that we could attempt to memorialize in the agreed order the parameters of such a hearing.

THE COURT: I will hear from the City in a moment, but let me ask you, Mr. Geissler, and I have looked into that as well. I am unaware of any case law authority that would give jurisdiction to the Court under a 41(a)(2) dismissal to do anything other than to enforce the settlement agreement.

Are you aware of any case law precedent that would allow the Court to have jurisdiction under the circumstances that you have just described?

MR. GEISSLER: Your Honor, I have been informed by our friends at AMA that they have in fact done that specific research only recently and are prepared to

present that case law. We would commend Your Honor's attention also to the text itself of Rule 41(a)(2) in which the conditions can be set.

THE COURT: I'm quite confident that conditions can be set, but Federal Rules of Civil Procedure do not confer subject matter jurisdiction. We know from case law, both from the United States Supreme Court and the Ninth Circuit, that when a case is dismissed with prejudice, even with conditions, the Court loses subject matter jurisdiction except to enforce the settlement agreement, and that's my concern.

MR. GEISSLER: We understand that, Your Honor. I believe that the problem may lie in our own drafting. In the settlement agreement itself, we use the term "dismissal with prejudice." In the motion to approve the settlement agreement, which is a joint motion between the City and the United States, we state out more carefully that procedure, and the procedure being conditional dismissal and only upon the conditions having been met, then a dismissal with prejudice. The prejudice would not be entered on the record and would not take any effect until after the condition is met.

THE COURT: So if that is something that you plan on either briefing or addressing or having someone brief further, that would be fine with me. But that is my

concern with just relying on a rule of civil procedure, because a rule by itself does not confer subject matter jurisdiction once lost.

MR. GEISSLER: Understood, Your Honor. Thank you.

THE COURT: Thank you.

Does the City wish to be heard?

MR. WOBORIL: Mr. Geissler has accurately and comprehensively summarized the ideas that were discussed by the parties. We are unable to announce some of the conclusions, as he notes, as to the value of various pieces of this proposed agreement, but we will take the proposed agreement to our client. It may help us in discussing the matter with our client to understand what exactly the Court wants to retain as an ability to affect the course of compliance with the agreement.

THE COURT: Sure. I found the fairness hearing input from all four parties, both in writing and orally, and also from the public very valuable. As you can tell from my tentative ruling, I am prepared to approve the agreement as fair, reasonable, and adequate, subject to the ability of the Court to just keep an understanding of how progress is being made.

There are a number of other issues that I raised in my questions. To paraphrase, I think, what the

parties' essential answers are, those points have some merits to them, and we will continue to discuss them, but we're not prepared at this time to put those specific substantive points in the settlement agreement. I accept that.

I do think that there is value to the Court hearing in a public hearing how things are progressing. I would envision that I would allow any of the four parties, the United States, the City, the Defendant-Intervenor Police Association, and the enhanced amicus to present to the Court, in whatever form it wishes, not including cross-examination, but whatever affirmative form it wishes, information to the Court in a public hearing -- and the COCL -- about how the agreement is progressing and where there are any obstacles, if there are any obstacles. I may have follow-up questions, just simply more information and to understand what's going on.

If I were to hear that the progress is quite insufficient and inadequate, I would ask the United States where do things stand in terms of the United States' consideration of bringing a motion before the Court. I won't speculate on what those circumstances might be or what the answers might be, but what I want to prevent is a situation arising in several years from now, after an agreement is made and approved, in which the United States

says that there isn't substantial compliance, or maybe one of the parties, the enhanced amicus, says that there is not substantial compliance. And we have heard nothing, and I can hear nothing from the United States, because the United States has chosen not to bring a motion.

I just want to make sure that if any settlement agreement is going to have the imprimatur of the Court, and I think as Mr. Geissler said, they didn't have to come to court. The parties could have worked out a private agreement if they wanted to. But if the parties are asking for the imprimatur of the United States District Court, I want to make sure that at least I am kept timely informed and in a public fashion about how things are progressing towards implementation with an eye towards eventually full dismissal unconditionally with prejudice.

MR. WOBORIL: Would the Court see a role in guiding performance under the contract based on information it receives at such a hearing?

THE COURT: The answer is no. I mean, that's not the Court's ruling. As I said, I'm not planning on micro-managing. Now, to be fair, some people may say, well, when somebody asks questions, is that guidance? Reasonable minds can disagree. Some may say yes; some may say no. But I am not planning, and I don't even think I will have the authority to enter any substantive orders at

all other than asking people to appear and answer questions.

Absent a motion by the Government to enforce, I do not believe, and I am prepared to accept that I will have no authority to order any specific course of action be taken other than periodic progress reports in answering informational questions that come from the Court.

MR. WOBORIL: Thank you, Judge. That's helpful. This is a complicated matter. We are going to have a very complicated briefing for our briefings. Ms. Osoinach may have follow-up questions that I haven't thought about.

MS. OSOINACH: I do have two questions. First, you said that the fairness hearing and the manner in which you received information was quite helpful to you, and then you also said at the annual hearings that you are contemplating that the purpose of the hearing is to receive information. So would you envision that, for instance, if the Albina Ministerial Alliance Coalition, if they wished to call members of the public to present information, would that be something that you would envision?

THE COURT: Yes. What I would not envision is the Court having its own public comment period. That's not what this is about. But I would invite information from any of the parties in whatever fashion the parties

wish to present. If the United States wanted to call Captain Gruber back or anyone else they wanted to call to present information, I would be glad to hear from them. If the City wanted to call anyone, whether it be council or anyone other than council, however the City wishes to present it, that would be fine with me. The same with the Portland Police Association and the same with the enhanced amicus. So if the enhanced amicus wanted to make argument to the Court, I would receive it. If the enhanced amicus wanted to present a witness on their behalf to provide information to the Court, I would receive it. I would not open it up, however, for general comment by the public.

MS. OSOINACH: Thank you. The second question, you said that your concern is you want to prevent a situation arising several years from now in which the United States says that there is no substantial compliance, and then you said "or maybe enhanced amicus."

Are you also envisioning a situation where the United States, the City -- we could be in agreement -- our COCL could have been in agreement, the community board could be in agreement that the City is in substantial compliance, and yet you would receive information from the enhanced amicus indicating that they believe that perhaps everyone was flawed.

What do you envision doing with that

information?

THE COURT: Well, the answer to your first question is, yes, I do envision that that would be an opportunity. What do I envision doing with it? Asking a question to the United States. If the United States and the City and the Portland Police Association believe that there has been substantial compliance and that no further activity is necessary, and they are prepared to dismiss the case, and if I dare say there is no motion necessary at all to enforce compliance, if the enhanced amicus, one of the four parties here, wants to make an argument to the contrary, since I'm not retaining any power to order any activity, but only to obtain information, I would receive that information from the enhanced amicus. And then I would probably turn to the parties, probably first to the United States and then to the City, and say: What's your response? I would say: The enhanced amicus says that in these particulars, there is not substantial compliance. What is your response? But I think that would be the end of my legal authority.

MS. OSOINACH: Thank you.

THE COURT: Does the Portland Police Association wish to be heard on any of these issues?

MR. KARIA: Nothing of substance right now, Your Honor. I think Mr. Geissler has adequately outlined

the issue that I think we need the two weeks to thoroughly vet and think about.

THE COURT: Does enhanced amicus wish to be heard on any of these issues?

MS. CURPHEY: Yes, Your Honor. We wish to be heard on our argument under 41(a)(2). I understand the Court's concern about jurisdiction. We put this in our brief. There is ancillary jurisdiction, and the Court's inherent power to vindicate its own authority. So I will walk with you through that. 41(a)(2), as you know, requires judicial authority to settle.

I recently found a case, which is not cited in my brief, which is Lau. It is at 792 F.2d 929. It is a Ninth Circuit case from 1986. It states, "A voluntary dismissal [under 41(a)(2)] cannot take effect until a court order has been entered and the terms and conditions imposed by the court are complied with."

I also want to note that in Kokkonen, which addresses this issue of ancillary jurisdiction under 41(a)(2), it makes a distinction between 41(a)(2) and 41(a)(1). Under 41(a)(2), which is what we're talking about here, it says the Court, in its discretion, may make compliance with the terms of the settlement agreement, one of the terms set forth in its order, whereas under 41(a)(1), "The Court may do so only if the parties agree."

I think you don't need all of our agreement to impose conditions in your acceptance of the settlement agreement and your entry of an order.

Additionally, Kokkonen, O'Connor, and Alvarado, are the Ninth Circuit cases cited, I think, in everyone's briefs about how the Ninth Circuit has dealt with Kokkonen. In all of those cases, they involved a situation in which the Court did not retain jurisdiction to enforce the terms of the settlement agreement. So they don't talk about what the Court can do under 41(a)(2). They don't reach that, because the Court never retained jurisdiction in the first place. In Alvarado, the jurisdiction had expired when the party brought its motion.

Those cases also don't describe the outer limits of the Court's inherent authority to enforce its own orders. I cite some cases in my brief that discuss that authority. Again, I don't think this requires an amendment to the agreement, because the parties could have agreed to dismiss under 41(a)(1). They didn't need your permission to do that. But they have agreed to ask you, under 41(a)(2). As you noted, the agreement says in paragraph 175(b), "The Court shall retain jurisdiction in this action for all purposes until the City has substantially complied with all provisions."

Moreover, the agreement, in that same paragraph, states that it is void if the Court does not retain jurisdiction. It doesn't say anything about it being void if the Court does retain jurisdiction. In fact, it anticipates that. So we don't think that you need all the parties to agree. We think you have the authority to require the status hearings, and I don't think it would require us to make any substantial changes to the agreement.

THE COURT: Since I don't need to rule on that question now, I am not going to, but I will share with you what my concerns are. First of all, under paragraph 178, I understand your argument, and you may very well be right, but it may also be an ambiguity in the agreement, and an ambiguity in the agreement might result in an unenforceable contract. It is unclear.

Now, with respect to your comments under 41(a)(2), here is my concern: If I were to impose conditions that were not agreed to, I need to be concerned about the Portland Police Association's collective bargaining rights.

Now, I've looked at the collective bargaining agreement. There is nothing implicated in the collective bargaining agreement that would be implicated if I were to require periodic reports of the sort that I have been

describing. However, the original underlying settlement agreement, at least so argues the Portland Police Association, does contain some provisions that at least they argue violate their collective bargaining rights. I have not made a ruling on that. But I do believe that if a settlement agreement were to violate the collective bargaining rights of a third party, like the Portland Police Association, it could not be entered purely by settlement agreement and by court order under any aspect of Rule 41. It could be ordered by the Court as part of equitable relief after a trial on the merits; then I'm not bound by the collective bargaining agreement.

As I read the Memorandum of Understanding and the documents filed by the Portland Police Association, they are agreeing to waive whatever arguments they may have that the settlement agreement contains provisions that violate their collective bargaining agreement, provided that the Court enter the relief that the parties request and no more. Therefore, at least arguably, and I'm not making a decision, but I'm sharing my thinking with you, at least arguably that waiver does not exist if I were to add additional conditions, which although Rule 41 might allow me to add, I might not be able to add if the legal effect were that the Portland Police Association withdraws its waivers of

objections to any other provisions in the settlement agreement that may or may not be in conflict with the collective bargaining agreement. That's why I will, at least, take this one step at a time.

MS. CURPHEY: I had this conversation with the attorney for the PPA. I obviously don't see how us speaking to you materially changes their MOU.

THE COURT: I would be fine if the Portland Police Association counsel want to say they have no objection to that and do not believe that these procedures that I have outlined and I have described tentatively, if he says those are acceptable to the Portland Police Association, then I have no problem with that. If he says, as he did in his post-hearing memo, that they do present a problem and that the entire waiver of any objections under the collective bargaining agreement are contingent on me not ordering those additional conditions, then I have some tough decisions to make.

MS. CURPHEY: Thank you.

THE COURT: Do you have an idea when you would like to report back? Do you want to report back to the Court in a hearing or just by paper?

MR. GEISSLER: Your Honor, if we may, could we have a two-week guidance and then submit something in writing, perhaps an agreed order? If the parties find it

necessary, if the Court would permit us to provide briefing -- not that it would be required -- but Your Honor has asked for legal authority under Rule 41, we may take advantage of that, Your Honor.

THE COURT: That makes sense. Unless anyone has any other approaches, I will order that two weeks from today the parties will submit any -- will that work? Two weeks from today? If you said you have to get back to a City Council meeting, when is your next City Council meeting?

MR. WOBORIL: It will happen next week. We would have a difficult time getting an ordinance on yet this week. We would have to do a lot of decision-making before Thursday. That's unlikely.

THE COURT: What time frame would the City like?

MR. WOBORIL: If it requires Council action, three weeks, Judge, I am afraid is necessary.

THE COURT: I have no problem with that.

MR. GEISSLER: Your Honor, we are not sure that it would actually require City Council vote if it is merely an agreed order of motion and not an amendment to the settlement agreement, but I believe that issue is still unresolved.

MR. WOBORIL: Perhaps we should try to move as quickly as possible or take the opportunity to move as

quickly as possible with a two-week setting. If we are not going to be able to do that, we will inform the parties and the Court and then adjust.

THE COURT: We will set it for two weeks. If anyone moves for an extension of one week or so beyond that, I anticipate granting that motion for extension of time.

MR. WOBORIL: Very good.

THE COURT: All right. So we will schedule right now that by the close of business on Monday, April 14th, the parties will submit to the Court in writing their positions in response to the tentative comments shared by the Court at this hearing. Let me know in your position whether there is agreement or not agreement among the four parties, and if there is not agreement, whether people believe that a further in-court hearing would be helpful to resolve these issues.

Anything further that we should address at this time in this hearing? First, the United States.

MR. GEISSLER: Nothing, Your Honor. Thank you very much for hearing from us today.

THE COURT: From the City?

MR. WOBORIL: Nothing more, Judge. Thank you.

THE COURT: From the Portland Police Association?

MR. KARIA: Nothing, Judge. Thank you.

THE COURT: And from enhanced amicus?

MS. ALBIES: Nothing further, Your Honor. Thank you.

THE COURT: Thank you. I look forward to reading what you submit by April 14th. We will be in recess. Thank you.

(Court adjourned.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature or digitally signed signature is not certified.

/s/ Dennis W. Apodaca March 25, 2014
DENNIS W. APODACA, RDR, RMR, FCRR, CRR DATE
Official Court Reporter